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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

TAMARA SETTLEMYERS et al., )

Plaintiffs, )

vs. )

PLAY LV GAMING OPERATIONS et al., )

**ORDER**

Defendants. )

2:09-cv-02253-RCJ-GWF

This case arises out of the termination of an employee, allegedly without time off as required by the Family and Medical Leave Act (“FMLA”). Defendant Play LV Gaming Operations, LLC, d.b.a. Las Vegas Club (the “Club”) has moved to dismiss for failure to state a claim, failure to join an indispensable party, and failure to exhaust non-judicial remedies. For the reasons given herein, the Court grants the motion in part, with leave to amend in part.

**I. FACTS AND PROCEDURAL HISTORY**

Plaintiff Tamara Shay Settemyers was a part-time cocktail waitress at the Club for over a year. (*See* First Am. Compl. ¶¶ 8, 18, Sept. 3, 2010, ECF No. 15). A Collective Bargaining Agreement (the “CBA”) between the Club and Local 226 of the Culinary Workers Union applied to Plaintiff’s employment. (*Id.* ¶ 16). On May 6, 2007, Plaintiff suffered incapacitating injuries to her shoulders and arms due to repetitive physical actions required by her duties at the Club. (*Id.* ¶ 18). On November 14, 2007, the Club terminated Plaintiff’s employment. (*Id.* ¶ 19).

1 Plaintiff and her husband, William Settemyers, sued the Club on seven  
2 causes of action: (1) Violation of the FMLA; (2) Breach of Contract; (3) Breach of Third-Party  
3 Beneficiary Contract; (4) Tortious Breach of the Implied Covenant of Good Faith and Fair  
4 Dealing; (5) Violation of NRS Section 613.330; (6) Intentional Infliction of Emotional Distress  
5 (“IIED”); and (7) Loss of Consortium. On August 3, 2010, the Court granted the Club’s motion  
6 to dismiss in part. (*See Order*, Aug. 3, 2010, ECF No. 14). Plaintiff filed the First Amended  
7 Complaint (“FAC”), which removes William Settemyers as a Plaintiff and lists six causes of  
8 action: (1) Violation of the FMLA; (2) Breach of Contract; (3) Breach of Third-Party  
9 Beneficiary Contract; (4) Tortious Breach of the Implied Covenant of Good Faith and Fair  
10 Dealing; (5) Violation of NRS Section 613.330; and (6) IIED. Defendant has moved to dismiss  
11 the FAC under Rules 12(b)(6) and (b)(7) and for failure to exhaust non-judicial remedies.

12 **II. LEGAL STANDARDS**

13 **A. Rule 12(b)**

14 “A failure to exhaust non-judicial remedies must be raised in a motion to dismiss, and  
15 should be treated as such even if raised as part of a motion for summary judgment.”

16 *Inlandboatmens Union of the Pac. v. Dutra Grp.*, 279 F.3d 1075, 1082 (9th Cir. 2002) (citing  
17 *Ritza v. Int'l Longshoremen's & Warehousemen's Union*, 837 F.2d 365, 368 (9th Cir. 1988)).  
18 Such a motion is a “non-enumerated Rule 12(b) motion.” *Id.* at 1078 n.2 (citing *Ritza*, 837 F.2d  
19 at 368–69) (internal quotation marks omitted).

20 **B. Rule 12(b)(6)**

21 Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the  
22 claim showing that the pleader is entitled to relief” in order to “give the defendant fair notice of  
23 what the . . . claim is and the grounds upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 47  
24 (1957). Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action  
25 that fails to state a claim upon which relief can be granted. A motion to dismiss under Rule

1 12(b)(6) tests the complaint's sufficiency. *See N. Star Int'l v. Ariz. Corp. Comm'n*, 720  
2 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule 12(b)(6) for  
3 failure to state a claim, dismissal is appropriate only when the complaint does not give the  
4 defendant fair notice of a legally cognizable claim and the grounds on which it rests. *See Bell*  
5 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the complaint is  
6 sufficient to state a claim, the court will take all material allegations as true and construe them in  
7 the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th  
8 Cir. 1986). The court, however, is not required to accept as true allegations that are merely  
9 conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden*  
10 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action  
11 with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a violation  
12 is plausible, not just possible. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly v.*  
13 *Bell Atl. Corp.*, 550 U.S. 554, 555 (2007)).

14 "Generally, a district court may not consider any material beyond the pleadings in ruling  
15 on a Rule 12(b)(6) motion. However, material which is properly submitted as part of the  
16 complaint may be considered." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542,  
17 1555 n.19 (9th Cir. 1990) (citation omitted). Similarly, "documents whose contents are alleged  
18 in a complaint and whose authenticity no party questions, but which are not physically attached  
19 to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss" without  
20 converting the motion to dismiss into a motion for summary judgment. *Branch v. Tunnell*, 14  
21 F.3d 449, 454 (9th Cir. 1994). Under Federal Rule of Evidence 201, a court may take judicial  
22 notice of "matters of public record." *Mack v. S. Bay Beer Distrib., Inc.*, 798 F.2d 1279, 1282  
23 (9th Cir. 1986). Otherwise, if the district court considers materials outside of the pleadings, the  
24 motion to dismiss is converted into a motion for summary judgment. *See Arpin v. Santa Clara*  
25 *Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001).

1           **C. Rules 12(b)(7) and 19**

2           A court may dismiss an action for failure to join a party under Rule 19. Fed. R. Civ. P.  
3       12(b)(7). A party must be joined if the court cannot accord complete justice in the party's  
4       absence. Fed. R. Civ. P. 19(a)(1)(A). If such a party cannot be joined, the court must decide  
5       whether the action can in equity and good conscience proceed. Fed. R. Civ. P. 19(b). Factors in  
6       determining whether to proceed include: the extent to which a judgment might prejudice the  
7       missing party or existing parties; the extent to which prejudice could be lessened or avoided by  
8       protective provisions in the judgment, shaping the relief, or other measures; whether the  
9       judgment would be adequate; and whether the plaintiff would have an adequate remedy if the  
10      case were dismissed for nonjoinder. Fed. R. Civ. P. 19(b)(1)–(4).

11          **III. ANALYSIS**

12          **A. FMLA**

13          Under the FMLA, "an eligible employee shall be entitled to a total of 12 workweeks of  
14       leave during any 12-month period . . . [b]ecause of a serious health condition that makes the  
15       employee unable to perform the functions of the position of such employee." 29 U.S.C.  
16       § 2612(a)(1)(D). It is "unlawful for any employer to interfere with, restrain, or deny the exercise  
17       of or the attempt to exercise, any right provided" under subchapter I of Chapter 28 of Title 29 or  
18       "to discharge or in any other manner discriminate against any individual for opposing any  
19       practice made unlawful" by subchapter I. *Id.* § 2615(a)(1)–(2). To establish a prima facie case of  
20       retaliation in violation of the FMLA, a plaintiff must allege: (1) she engaged in a protected  
21       activity under the FMLA; (2) she suffered adverse action by the employer following the  
22       protected activity; and (3) the adverse employment action was causally linked to the protected  
23       activity. *Raymond v. Albertson's Inc.*, 38 F. Supp. 2d 866, 869 (D. Nev. 1999) (Rawlinson, J.).

24          The *McDonnell Douglas* burden-shifting framework applies to an FMLA claim:

25          [O]nce the employee has established a prima facie case, the burden shifts to the  
                  employer to articulate a legitimate nonretaliatory reason for its employment decision.

Once the employer meets its burden, the employee must show that a material issue of fact exists regarding whether the employer's proffered reason for the challenged action is a pretext.

*Id.* (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973)).

The Court will not, as the Club requests, dismiss for failure to exhaust non-judicial remedies. The Club argues that the FMLA claim should in fact be brought against Local 226 as a § 301 claim under the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. The Club notes that the statute of limitations for § 301 claims is six months, and it posits that this is why Plaintiff has characterized her claim, which she filed over two years after accrual, as an FMLA claim against the Club.

Plaintiff need not exhaust any putative claims against Local 226, because her claims do not depend on the meaning of any CBA provision. *See Ward v. Circus Circus Casinos, Inc.*, 473 F.3d 994, 998 (9th Cir. 2007) (holding that state tort claims did not require the interpretation of any CBA provision and could therefore proceed without arbitration). Likewise, here, the FMLA provides standards of conduct independent from the provisions of the CBA, and FMLA claims need not be arbitrated under a CBA unless the CBA contains a clear and unmistakable waiver of the right to a judicial forum to adjudicate FMLA claims. *See Wright v. Univ. Mar. Serv. Corp.*, 525 U.S. 70, 78–79 (1998) (holding that because federal statutory rights under the ADA did not arise out of the CBA, the plaintiff's ADA claims were not arbitrable under the general arbitration clause of the CBA); *Mitchell v. Chapman*, 343 F.3d 811, 824 (6th Cir. 2003) (applying *Wright* to FMLA claims). *Wright* is directly on point here. Plaintiff need not arbitrate the FMLA claim under the CBA unless the Club can show that the CBA clearly and unmistakably requires it. The Club has made no such showing. Nor is Local 226 a necessary party to the FMLA claim.

The Court will dismiss the FMLA claim with prejudice under Rule 12(b)(6), however. Plaintiff alleges that under the CBA, she was in fact entitled to six months of leave, more than the twelve weeks required by the FMLA. (*See* FAC ¶ 34). As noted, however, the CBA does not

1 preempt or control the FMLA claim. If Plaintiff believes her rights under the CBA were  
2 violated, she must arbitrate such a claim under the CBA's general arbitration clause. *See infra*  
3 Part III.B. Plaintiff admits she received "paid medical leave" from the Club from May 16, 2007  
4 through August 14, 2007. (*See* FAC ¶ 41). She admits she then took unpaid leave through  
5 September 10, 2007. (*See id.* ¶ 43). On September 7, 2007, three days before her leave ended,  
6 Plaintiff asked an employee of the Club to extend her leave through September 26, 2007 in  
7 accordance with the recommendation of her doctor, but the employee denied her request and told  
8 her she would be fired if she did not return to work on September 10, 2007. (*See id.* ¶¶ 48–50).  
9 Assuming for the purposes of the motion to dismiss that these allegations are true, Plaintiff will  
10 have stated a prima facie FMLA claim if the employer's denial of leave beyond September 10,  
11 2007 violated the requirements of the FMLA. The dispositive question remaining is whether the  
12 total amount of leave Plaintiff was permitted to take equaled or exceeded twelve workweeks. *See*  
13 29 U.S.C. § 2612(a)(1). It did, and the facts Plaintiff has alleged therefore make her FMLA  
14 claim not only implausible under *Twombly* and *Iqbal*, but also impossible under *Conley*.  
15 Plaintiff admits taking leave continuously from May 16, 2007 until September 10, 2007. May  
16 16, 2007 was a Wednesday. Plaintiff's first full workweek of leave therefore ended on the  
17 following Tuesday, May 22, 2007. The twelfth full workweek ended on August 7, 2010. Not  
18 only does Plaintiff admit on the face of the FAC receiving more than twelve full workweeks of  
19 leave, she admits receiving more than twelve full workweeks of *paid* leave, which the FMLA  
20 does not even require. *See* 29 U.S.C. § 2612(c) ("Except as provided in subsection (d) of this  
21 section, leave granted under subsection (a) may consist of unpaid leave."). The Court therefore  
22 dismisses the FMLA claim under Rule 12(b)(6), without leave to amend.

23       **B. Contract-Based Claims**

24       The Club is correct that § 301 of the LMRA requires arbitration of the contract-based  
25 claims (claims two, three, and four) if determination of those claims will require interpretation of

1 the CBA that Plaintiff admits governed her employment. *See Allis-Chalmers Corp. v. Lueck*, 471  
 2 U.S. 202, 218–19 (1985). Assuming the CBA contains a general arbitration clause—no copy of  
 3 the CBA is in the record—claims such as these in a typical case should normally be dismissed  
 4 under Rule 12(b) for failure to exhaust non-judicial remedies. Still, an employee may litigate a  
 5 CBA-arbitrable grievance directly if she can show her union did not fairly represent her. *See*  
 6 *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 563–67 (1976). This is a high standard:

7 A breach of the statutory duty of fair representation occurs only when a union's  
 8 conduct toward a member of the collective bargaining unit is arbitrary,  
 9 discriminatory, or in bad faith . . . . Though we accept the proposition that a union  
 10 may not arbitrarily ignore a meritorious grievance or process it in a perfunctory  
 11 fashion, we do not agree that the individual employee has an absolute right to have  
 12 his grievance taken to arbitration.

13 *Vaca v. Sipes*, 386 U.S. 171, 190–91 (1967). In other words, an employee does not have the  
 14 ability to compel arbitration, but only a right to good faith representation. *See Hines*, 424 U.S. at  
 15 567 (citing *id.* at 191–92). Plaintiff has sufficiently alleged arbitrary or bad faith conduct by her  
 16 union. The Court will therefore not dismiss the second and third claims at this time. The  
 17 tortious bad faith claim, however, is dismissed with prejudice under Rule 12(b)(6) because it is  
 18 implausible and cannot be cured by amendment, as an employer is not a fiduciary of an  
 19 employee. *See Ins. Co. of the West v. Gibson Tile Co., Inc.*, 134 P.3d 698, 702 (Nev. 2006).

### 17       C.     NRS Section 613.330

18 Plaintiff alleges the Club terminated her because of her disability in violation of NRS  
 19 section 613.330. A person aggrieved by a violation of section 613.330 may complain to the  
 20 Nevada Equal Rights Commission (“NERC”), Nev. Rev. Stat. § 613.405, and may appeal to the  
 21 courts if NERC denies the complaint, *id.* § 613.420. The statute of limitations is 180 days after  
 22 the date of the acts complained of. *Id.* § 613.430. Plaintiff alleges she received a right-to-sue  
 23 letter from the Equal Employment Opportunity Commission (“EEOC”), which has a work-  
 24 sharing agreement with NERC, on September 1, 2009. (*See* FAC ¶ 11). She sued fifty-four days  
 25 after receipt of the letter. This claim is not preempted by the CBA, because Plaintiff's rights

1 against discrimination arise out of a state statute and are not determined by interpretation of the  
2 CBA. *See Wright*, 525 U.S. at 78–79.

3 Chapter 613 defines “disability” as “[a] physical or mental impairment that substantially  
4 limits one or more of the major life activities of the person, including, without limitation, the  
5 human immunodeficiency virus; [a] record of such an impairment; or [b]eing regarded as having  
6 such an impairment.” Nev. Rev. Stat. § 613.310(1)(a)–(c). This language mirrors the language  
7 of the Americans with Disabilities Act (“ADA”). *See* 42 U.S.C. § 12102 (1)(A)–(C). Therefore,  
8 the courts look to federal ADA cases when applying section 613.330. *Puckett v. Porsche Cars of*  
9 *N. Am., Inc.*, 976 F. Supp. 957, 960 (D. Nev. 1997) (Hagen, J.). An impairment does not qualify  
10 under the “being regarded as having such an impairment” prong if it has an actual or expected  
11 duration of less than six months. *See* 42 U.S.C. § 12102(3)(B).

12 Plaintiff does not allege facts sufficient to indicate that her injuries substantially impaired  
13 a major life activity. She alleges “incapacitating injuries to her shoulders and arms which were  
14 caused by the repetitive physical actions required by her job duties as a cocktail waitress.” (First  
15 Am. Compl. ¶ 18). Presumably, her doctor gave her some sort of lifting restriction. Temporary  
16 lifting restrictions do not generally constitute “substantial limitation” under the ADA. *See, e.g.*,  
17 *Thompson v. Holy Family Hosp.*, 121 F.3d 537, 539–40 (9th Cir. 1997) (holding that a restriction  
18 against continuously lifting 25 pounds, lifting over 50 pounds twice a day, or lifting over 100  
19 pounds once a day did not constitute a “substantial limitation” under the ADA). Because this  
20 deficiency can be cured if Plaintiff can allege an injury of sufficient limitation and duration, the  
21 Court dismisses the Chapter 613 claim, with leave to amend.

22 **D. IIED**

23 The elements of an IIED claim are “(1) extreme and outrageous conduct with either the  
24 intention of, or reckless disregard for, causing emotional distress, (2) the plaintiff’s having  
25 suffered severe or extreme emotional distress and (3) actual or proximate causation.” *Star v.*

*Rabello*, 625 P.2d 90, 91–92 (Nev. 1981). Generally, physical injury or illness caused by the alleged emotional distress is required when there is no physical impact to the Plaintiff. *Barmettler v. Reno Air, Inc.*, 956 P.2d 1382, 1387 (Nev. 1998). “The less extreme the outrage the more appropriate it is to require evidence of physical injury or illness from the emotional distress.” *Nelson v. City of Las Vegas*, 665 P.2d 1141, 1145 (Nev. 1983).

[C]laims for assault and battery provide the outer limits of extreme outrage. Thus, an assault, a tort that does not require a physical impact, is in and of itself a predicate for an award of nominal or compensatory damages without proof of “serious emotional distress.” Thus, the standard of proof for emotional distress damages arising from assault and battery is not as stringent as the standard of proof requirement for bare claims of intentional or negligent infliction of emotional distress.

<sup>10</sup> *Olivero v. Lowe*, 995 P.2d 1023, 1026 (Nev. 2000).

11 The basis for the IIED claim here is employment termination. Plaintiff does not  
12 sufficiently allege extreme and outrageous conduct. She alleges that the Club misrepresented the  
13 available leave (under the CBA) and coerced her to work with the intent to cause her further  
14 injury. The allegation of intent to cause injury is conclusory. Furthermore, Plaintiff does not  
15 allege the type of physical manifestations of emotional distress required to support an IIED  
16 claim. Plaintiff alleges referral for psychiatric treatment, but she alleges no physical injury or  
17 illness resulting from the alleged emotional distress. Because it appears that amendment is  
18 futile, this claim is dismissed, without leave to amend.

## CONCLUSION

IT IS HEREBY ORDERED that the Motion to Dismiss (ECF No. 16) is GRANTED in part. All claims are dismissed except the second and third, with leave to amend the fifth claim.

## 22 IT IS SO ORDERED.

23 Dated this 18th day of March, 2011.

ROBERT C. JONES  
United States District Judge